74-2281

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 197__

No. A-1325

Supreme Court, U. S.
FILED
SEP 9 1974
MICHAEL RODAK, JR., CLERK

MURRAY TAYLOR,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

1. Order on Jury Verdict by Trial Court. This Order is unreported and attached hereto as Appendix A.
2. Opinion of the United States Court of Appeals for the Sixth Circuit. This Opinion is unreported and attached hereto as Appendix B.

3. Order of the United States Court of Appeals for the Sixth Circuit Denying Petition to Rehear or to Rehear En Banc. This Order is unreported and attached hereto as Appendix C.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS BASED

Defendant Taylor was indicted by the Federal Grand Jury for the Western District of Tennessee, Eastern Division. At the trial of this cause in the United States District Court, Defendant was convicted of violations of certain Federal statutes and sentenced by the Court. The Defendant timely appealed to the United States Court of Appeals for the Sixth Circuit which

rendered its decision in the cause on May 7, 1974. This decision reversed the conviction for violation of 18 USC Sec. 2315 as charged in Count Four of the indictment and upheld the conviction for conspiracy as charged in Count One of the indictment. Defendant petitioned the Court of Appeals for a Rehearing or a Rehearing En Banc which Petition was denied by Order of the Court of Appeals entered July 5, 1974. On July 25, 1974, the Defendant petitioned the Honorable Potter Stewart, Circuit Justice, for an extension of time within which to file a Petition for Writ of Certiorari. This Petition was granted by Order of Justice Stewart dated July 26, 1974, allowing Petitioner thirty (30) additional days up to and including September 4, 1974.

This Court's jurisdiction to review the aforesaid decision by Writ of Certiorari is conferred by 28 USC Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit erred in its determination that Defendant Taylor was without standing to object to the search of Co-Defendant's premises, thus misinterpreting this Court's decision in Brown v. United States, 411 U.S. 223, 93 S.Ct. _____, 36 L.Ed. 208 (1973) in view of the form and import of Count One of the Indictment and the Trial Court's charge.

2. Whether it is permissible to assume that the improperly admitted evidence relating to the Traxcavator had no significant effect

upon the jury's determination that Defendant Taylor was guilty of conspiracy as charged in Count One of the Indictment beyond a reasonable doubt.

3. Whether the determination of sufficiency of the evidence to support Defendant Taylor's conviction of conspiracy as charged in Count One of the Indictment was based upon a misconception of the evidence by the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States: Searches and Seizures.--

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fifth Amendment to the Constitution of the United States: Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property.--

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Title 18 United States Code Section 2312:

Transportation of stolen vehicles.--

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been

stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

4. Title 18 United States Code Section 2313:

Sale or Receipt of Stolen Vehicles.--

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

5. Title 18 United States Code Section 2314:

Transportation of Stolen Goods, Securities, Moneys, Fraudulent State Tax Stamps, or Articles Used in Counterfeiting.--

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or

to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof--

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

6. Title 18 United States Code Section 2315: Sale or Receipt of Stolen Goods, Securities, Moneys, or Fraudulent State Tax Stamps.--

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making,

forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof--

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country.

7. Title 18 United States Code Section 371:

Conspiracy to Commit Offense or to

Defraud United States.--

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT OF THE CASE

On January 10, 1972, a four-count Indictment was returned against Defendant Taylor and three co-defendants, charging them in Count One with willfully and knowingly combining, conspiring and agreeing to transport, receive and conceal stolen property and stolen motor vehicles moving in interstate commerce. Defendant Taylor and Co-Defendant Griffin allegedly committed the overt acts of concealing a stolen Massey Ferguson backhoe. Defendant Taylor was charged in Count Four with receiving and concealing a Caterpillar Traxcavator, which was moving

in interstate commerce, and was charged with knowing the vehicle was stolen. The Indictment reads in pertinent part as follows:

COUNT ONE

On or about the 4th day of October, 1971, and continuing thereafter until on or about the 13th day of January, 1972, in the Western District of Tennessee, Eastern Division,

L. J. GRIFFIN, MURRY TAYLOR, LENDALE HEARN, and DEWEY THOMAS BERRYHILL

did willfully and knowingly combine, conspire, and agree to commit criminal offenses against the United States of America; that is, did agree to transport, receive, and conceal stolen property and stolen motor vehicles moving in interstate commerce; in violation of Title 18, United States Code, Sections 2312, 2313, 2314, and 2315.

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy, and to effect the objects thereof:

1. In October and November, 1971, the precise dates being unknown to the Grand Jury, in the Western District

of Tennessee, Eastern Division, the defendant, MURRAY TAYLOR, did conceal a stolen Massey Ferguson front-end loadster and backhoe, Serial Number 9A 15631.

2. On or about the 10th day of January, 1972, in the Western District of Tennessee, Eastern Division, the defendant, L. J. GRIFFIN, did conceal a stolen Massey Ferguson front-end loadster and backhoe, Serial Number 9A 15631.

3. On or about the 15th day of December, 1971, in the Western District of Tennessee, Eastern Division, the defendant, L. J. GRIFFIN, did conceal a stolen 1971 Honda 350 Motorcycle, VIN 3503002062.

In violation of Title 18, United States Code, Section 371.

nm $10,000., or nm 5 yrs.,
or both

COUNT FOUR

On or about the 12th day of January, 1972, in the Western District of Tennessee, Eastern Division, MURRAY TAYLOR did receive and conceal goods, wares and merchandise, that is, a Caterpillar Traxcavator Model 955K, Serial Number 85J3681, of a value in excess of Five Thousand Dollars

($5,000.00), which was moving as interstate commerce from Gary, Indiana, to Weakley County, Tennessee, and he then knew the same to have been stolen; in violation of Title 18, United States Code, Section 2315.

nm $10,000., or nm 10 yrs., or both

Beginning on January 26, 1973, and ending on February 1, 1973, the case was tried before a jury, upon a plea of not guilty to each count, and the jury found the defendant guilty on both Count One and Count Four.

On February 8, 1973, the defendant was judged by the Court to be guilty as charged in Counts One and Four of the Indictment. On Count One, the Court sentenced the defendant to be imprisoned for one (1) year and one (1) day and to pay a fine of Five Hundred Dollars ($500.00). On Count Four, the Court sentenced the defendant to be imprisoned for one (1) year and one (1)

day and to pay a fine of Five Hundred Dollars ($500.00), said sentences to run concurrently and total fine to be One Thousand Dollars ($1,000.00).

On February 7, 1973, the defendant filed a Motion for a Judgment of Acquittal, or, Alternatively, for a New Trial, and the issues raised on said Motion included those raised on Appeal. The Motion was heard and overruled by the Trial Court on February 14, 1973. Notice of Appeal was filed on February 15, 1973, and the Appeal was otherwise perfected in a timely manner and carried to the United States Court of Appeals for the Sixth Circuit, which remanded in part and affirmed in part.

The evidence shows that on January 12, 1972, a search warrant was issued to search the premises of Defendant Taylor for a

welding machine. The search warrant was executed the same day,and the welder enumerated on the face of the warrant was discovered. Subsequent to the discovery of the welder, a further search uncovered a Caterpillar Traxcavator, Model No. 955K, Serial No. 85J3681. This piece of equipment was the one Defendant Taylor was charged with possessing unlawfully in Count Four of the Indictment.

The Court of Appeals for the Sixth Circuit held the search as described above to be illegal and, therefore, ruled that any evidence obtained as a result thereof is not admissible in a criminal prosecution against Defendant Taylor.

A search warrant was issued on January 10, 1972, for a D-4 Caterpillar

bulldozer, Serial No. 7U42919. This search warrant authorized the search of Co-Defendant L. J. Griffin's premises. Pursuant to this warrant, the officers conducted the search and discovered immediately that the bulldozer was not the one for which they were searching; despite this fact, they continued with an exploratory search. During this exploratory search, the officers discovered a Massey Ferguson backhoe in a shed. (A backhoe is a piece of excavating equipment. It is a tractor fitted with a special mechanical shovel on the rear and a loading scoop on the front.) The officers conducting the search had no knowledge that the backhoe was a stolen piece of equipment, but with some difficulty, they found and recorded the serial number and then left the premises on January 10, 1972. Subsequent investigation revealed that the backhoe was a piece of stolen equipment.

On January 14, 1972, a search warrant was issued, itemizing the aforesaid backhoe and directing that a search be conducted on Co-Defendant Griffin's premises. Though the search warrant on its face indicates that Agent Ancil McDuffee of the Tennessee Bureau of Investigation received information from a reliable source who saw the backhoe on the premises, the testimony revealed that he was in fact his own informant and that the knowledge of the backhoe had come to light only as the result of the illegal search on January 10, 1972. The Sixth Circuit Court of Appeals held both of the above-described searches to be invalid and held that the evidence should have been excluded at the trial, but held that Defendant Taylor had no standing to complain of its admission on Appeal.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The Federal District Court for the Western District of Tennessee, Eastern Division, obtained jurisdiction of the case below by an Indictment returned by the Grand Jury for that District, charging Defendant Taylor with violations of Federal Law allegedly occurring within that District and, more specifically, with violating Title 18 USC Sec. 371 by conspiring to violate Title 18 USC Sec. 2312, 2313, 2314, and 2315, and with the violation of Title 18 USC Sec. 2315.

ARGUMENT

I

The Court of Appeals for the Sixth Circuit has misinterpreted and thus misapplied this Court's decision in Brown v. United States, 411 U.S. 223, 93 S.Ct. 39 L.Ed. 208 (1973), by its failure to distinguish the facts in Brown as opposed to the facts in the case at bar. The Court of Appeals ruled that all searches incident to this Indictment were defective in one or more respects, but stated that Defendant Taylor did not have standing to question the validity of the searches conducted on Co-Defendant Griffin's premises on Appeal.

In the Brown case, this Court refused to make a determination concerning whether or not a co-conspirator had "automatic" standing to object to the search of a

co-defendant's premises, reserving the question for a case where possession at the time of the contested search and seizure was an essential element of the offense charged.

In Brown, supra, possession of the seized evidence at the time of the contested search and seizure was determined immaterial for the reason (1) that the stolen goods seized had been transported and "sold" by the petitioners in that cause before the challenged search and (2) that the Indictment had been carefully limited to the period before the day of the search, thereby eliminating possession as an element of the offense.

In the case at bar, an illegal search took place on January 10, 1972. As a result of this search, the law officers gained the information which was the basis

for the illegal search which took place on January 14, 1972. The Indictment alleges the conspiracy to have continued until January 13, 1972. Furthermore, Co-Defendant Griffin is specifically alleged in Count One of the Indictment to have concealed the backhoe on or about the 10th day of January, 1972.

Not only was the search conducted on Co-Defendant Griffin's premises on January 10, 1972, initially illegal; but it became exploratory in nature. At the time the officers discovered the backhoe in a closed shed, they had no information that it was stolen. The sole basis for the issuance of the warrant for the second search for the backhoe, conducted on January 14, 1972, was the information the officers had procured while on the premises pursuant to the first illegal search.

It is certainly apparent that the search on January 10 was strictly exploratory in nature and intolerable in its intensity and scope. Information gained by these law enforcement officers during the illegal search on January 10 cannot be used in any derivative manner to obtain other evidence. Such evidence is blatantly the "fruit of the poisonous tree."

The evidence actually discovered in the illegal exploratory search conducted on January 10 and later made the basis for the illegal search conducted on January 14 is the only foundation for the involvement of Defendant Taylor in the conspiracy charge of Count One of the Indictment, upon which he still stands convicted. There is not a scintilla of evidence of Defendant Taylor's involvement in any conspiracy except the overt acts concerning the backhoe alleged

in Count One of the Indictment and the evidence which was introduced concerning a Traxcavator in Count Four of the Indictment, Count Four now having been remanded for a new trial.

Not only did Count One of the Indictment and the proof in the case establish possession as an essential element of the crime of conspiracy in this cause, but the Trial Court, in specifically charging in regard to possession, stated that the law recognizes two (2) kinds of possession, i.e., actual possession and constructive possession. The Trial Court instructed the jury that if any defendant had either actual or constructive possession, either alone or jointly, as charged in the Indictment, the possession is joint.

It is respectfully submitted by Defendant Taylor that the Government and

the Trial Court specifically made possession an essential element of the crime charged and sought and obtained a conviction of Defendant Taylor solely on such evidence. The Court of Appeals for the Sixth Circuit held that footnote number four of the Brown opinion implicitly rejects the concept of "constructive possession." This is incorrect. In any event, however, the jury was instructed to apply the law of constructive possession as it pertained to Defendant Taylor and the co-defendants.

The Sixth Circuit Court of Appeals in its opinion implies as pertains to possession (1) that it was an essential element in the Indictment, (2) that it was the basis for the only evidence introduced at trial involving Defendant Taylor in the conspiracy, and (3) that it was given to the jury to deliberate in the Trial Court's

charge. Since the Court of Appeals now says that possession is not to be considered an essential element of the crime for which the defendant was charged and convicted, a prosecutorial self-contradiction exists.

As opposed to the facts in Brown, supra, there is not only present, but completely controlling, the vice of allowing the Government to allege possession as part of the crime charged and yet deny that there was possession sufficient for standing purposes. If the decision of the Sixth Circuit Court of Appeals is allowed to stand, the Government will have been allowed to take full advantage of contradictory positions.

It is very important that the confusion occasioned by the Brown decision be settled. The facts in the case at bar present to this Court the opportunity to

clarify and/or expand Brown in order to shed much needed light on this apparently uncertain area of the law.

II

After holding that the evidence relating to the Traxcavator found in Defendant Taylor's barn should not have been admitted at the trial, the Court of Appeals proceeded to assume that the circumstantial evidence relating to the backhoe was sufficient to sustain Defendant Taylor's conviction on the conspiracy count of the Indictment. It is respectfully contended that such an assumption is not constitutionally permissible on the facts of this case. The entire thrust of the Government's case in the consolidated trial attempted to establish that Defendants Griffin and Hearn were

intimately involved with the theft, transportation, and attempted sale of the Traxcavator.

It is further contended that all the evidence presented in this regard was ill-gotten and came to light only as a result of the search of Taylor's barn which has already been determined to have been illegal. The inference which the Government sought to have the jury draw was that a conspiracy between Griffin, Hearn and Taylor could be shown by their purported mutual involvement with the stolen Traxcavator. True, the charge of illegally possessing the Traxcavator was not made a part of the conspiracy count, but this distinction is one of form merely and has no substance. A cursory reading of the record in this cause leads to the inescapable conclusion that the jury

determined that Co-Defendants Griffin and Hearn transported and attempted to sell the stolen Traxcavator and, after failing to do so, returned it to the farm of their alleged Co-Conspirator Taylor.

The evidence as regards the backhoe is scant at best. There certainly were other equally reasonable inferences to be drawn from that evidence other than that of guilt. Surely, Defendant Taylor is entitled to a new trial on the evidence relating to the backhoe alone, if that evidence is indeed inadmissible. If the Court of Appeals were correct, he will again be convicted of conspiracy, and justice will have been served. If, as we contend, the Court of Appeals were incorrect, he will be acquitted, and justice will have been served. It cannot be the law that a man can be put to trial and have a great amount of damaging

and inculpatory evidence illegally obtained and inadmissibly presented against him and then be denied any effective objection thereto on an intimately related charge. It is respectfully contended that the Court of Appeals has strayed far from the accepted standards of American practice to "assume" that Defendant Taylor would have been convicted without the admission of the vast majority of evidence against him. It should be remembered also that the Trial Court charged the jury that they should return a verdict of guilty if the circumstantial evidence gave rise to the inference of guilt and to "no other equally reasonable inference . . . ," thus depriving Defendant Taylor of the benefit of being proven guilty beyond a reasonable doubt. This is particularly crucial when, as here, the admissible evidence of guilt is so scant.

This is a situation that needs correcting since if the rule applied below becomes the law, there will be small deterrent to policemen who would themselves break the law in their overzealous attempts to feret out crime.

III

Allowing the conviction of conspiracy to stand supported only by the evidence relating to the backhoe cries out the more for correction when it is realized that the Court of Appeals in reaching this conclusion relied upon "facts" that were never directly or indirectly admitted into evidence, legally or illegally. The Court states that Defendant Taylor lived on a farm some three (3) miles from the farm of Defendant Griffin. No testimony was at any

time introduced which touched upon this matter, and it could be shown that the farms are well over twenty (20) miles apart. The Court of Appeals in recounting evidence which it considered sufficient to support a conviction further stated that several witnesses testified that Taylor had had in his possession "the same piece of equipment" discovered on Griffin's farm. No such testimony is in the record. The strongest testimony mustered by the Government was that the two (2) pieces of equipment were similar, that the identifying marks were characteristic of that type of equipment, and that there were differences in the two (2) backhoes.

The Court of Appeals stated that the backhoe was in Arkansas in late December, 1971; and,therefore, it could have been the one seen on Defendant Taylor's farm in

October, 1971. No such testimony is in the record. The Government's witnesses in fact placed the backhoe is Arkansas in October, 1971, making it impossible for Taylor to have possessed the stolen backhoe since the backhoe he had was in his possession in October. The Court of Appeals stated that when Defendant Taylor retrieved a backhoe from a neighbor, Taylor said that he had to deliver it to someone else. The Court inferred that it was to be delivered to a co-defendant. That same neighbor, however, also testified that the backhoe was loaned to him again a short time thereafter.

It is clear, therefore, that the Court of Appeals misapprehended the evidence as presented in the record and as a result determined that sufficient evidence existed to warrant a conviction. It is respectfully

submitted to this Court that had the illegal and inadmissible evidence been kept from the jury as the law requires, a verdict of guilty would be difficult to imagine. These errors in understanding and interpreting the evidence should be corrected since the Court of Appeals has departed from accepted standards and since a simple and readily available method exists to determine the matter. The case should be remanded for a new trial so that all the legal and admissible evidence in this case might go to the jury for its consideration without the taint of evidence illegally obtained in clear controvention of the Fourth and Fifth Amendments to the Constitution of the United States.

CONCLUSION

For the reasons set out above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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September, 1974

AFFIDAVIT OF SERVICE

I, William R. Neese, attorney for Petitioner, Murray Taylor, make oath that I have served the foregoing Petition for Writ of Certiorari upon the United States, being the only party upon which service is required, by depositing three copies thereof in the United States mails, airmail postage prepaid and addressed to Solicitor General, Department of Justice, Washington, D.C., 20530, and by depositing three copies thereof in the United States mails first class postage prepaid and addressed to Honorable Glen Reid, Jr., Assistant U.S. Attorney, 1058 Federal Office Building, Memphis, Tennessee, 38103.

This the 3rd day of September, 1974.

William R. Neese

William R. Neese

STATE OF TENNESSEE
COUNTY OF HENRY

Sworn to and subscribed before me this the 3rd day of September, 1974.

MARVIN MORTON NOTARY PUBLIC AT LARGE STATE OF TENNESSEE

Marvin Morton

My commission expires 18 March 1975.

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